

# THE FRACTURED UNITY OF ANTITRUST LAW AND THE ANTITRUST JURISPRUDENCE OF JUSTICE STEVENS

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## I. INTRODUCTION

Justice John Paul Stevens has had a major impact on the development of antitrust law since his elevation to the Supreme Court in 1975. He has written opinions in more than 30 antitrust cases that have come before the Court, and this count does not include a number of cases principally concerned with more general issues of procedure that arose in an antitrust context. Justice Stevens has written for the Court in major cases covering a broad range of antitrust issues. These include cases involving horizontal restraints among competitors,<sup>1</sup> tying,<sup>2</sup> monopolization,<sup>3</sup> and mergers.<sup>4</sup> He has also written frequently to explain not only his dissent from the Court's decision but, on numerous occasions, his reasons for concurring with the majority's decision but departing from its reasoning.

Reading the compendium of Justice Stevens's antitrust opinions suggests several reasons for his proclivity to write separately in so many antitrust cases. The first is his general conception of the judicial role, the importance to him of explaining as fully and clearly as possible the reasons for his reaching a particular decision. The deliberative process—whether in the legislature, the executive, or the courts—emerges as central to Justice Stevens's model of government. In his view, the judge's role within this model is to be clear to the court's various audiences about the reasons for the decisions that are made. Hence, one finds that even when he is joining a

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1. Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411 (1990); National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

2. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14-15 (1984); United States Steel Corp. v. Fortner Enter., Inc., 429 U.S. 610 (1977).

3. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

4. California v. American Stores, 495 U.S. 271 (1990).

dissent, Justice Stevens may write separately, however briefly, to explain the nuance of difference between him and the other dissenters.<sup>5</sup>

The second principal reason for the scope and depth of Justice Stevens's antitrust opinions is his deep affection and concern for antitrust law and policy, which is manifested in his opinions. He is devoted to this area of the law, an area in which he practiced, taught, and served in government.<sup>6</sup> It seems, from his opinions, that it is particularly important to him that this body of law be faithfully and soundly developed. Hence, Justice Stevens takes great pains to see that the analyses of the antitrust cases that come before the Court are as complete and as careful as possible.

It is for these reasons, perhaps, that Justice Stevens's antitrust jurisprudence is so enlightening. Not only have his opinions for the Court shaped antitrust law in a major way over the past twenty years, but the set of all his antitrust opinions—concurrences and dissents, as well as opinions for the Court—taken together provides a fairly complete picture of one major player's conception of this body of law. The themes and the tensions reflected in Justice Stevens's opinions mirror those in the body of antitrust law today. And because he writes with great clarity, the image in that mirror is sharply defined.

The image of antitrust law that emerges from Justice Stevens's opinions has, I shall argue, several prominent features. First, he is searching for a coherence and unity in antitrust law. But this search is sharply constrained by his deep respect for both the will of the legislature, as revealed by the legislative history of the antitrust statutes, and judicial precedent. Taken together these legislative and judicial expressions make it difficult to adhere to the view that the goal of antitrust law is single-minded. And, the role that earlier opinions accord *per se* analysis makes it difficult to argue that there is a unitary approach to deciding antitrust cases. Second, Justice Stevens's strong support of the broad purposes of antitrust law leads him to stretch the

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5. See, e.g., *Jefferson County Pharmaceutical Ass'n v. Abbott Lab.*, 460 U.S. 150, 171 (1983) (Stevens, J., dissenting).

6. Justice Stevens served from 1951 to 1952 as Associate Counsel to the Subcommittee on the Study of Monopoly Power, Committee on the Judiciary, United States House of Representatives; and from 1953 to 1955 as Member of the Attorney General's National Committee to Study the Antitrust Laws. He was Lecturer in Antitrust Law at Northwestern University School of Law from 1950 to 1954, and at the University of Chicago Law School from 1955 to 1958. From 1950 until his appointment as a federal judge in 1970, he was a private practitioner with a specialization in antitrust. See Richard Y. Funston, *Stevens, John Paul*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 836 (Kermit L. Hall ed., 1992); *Tribute, John Paul Stevens, 1992-1993 ANNUAL SURVEY OF AMERICAN LAW*.

reach of the statutes as far as possible. For example, he casts a skeptical eye on exemptions from the antitrust laws, and he insists that particular organizational relations between potential defendants not lead their joint activities to evade the grasp of those laws. But, although the Justice would have antitrust policy sweep broadly vis-à-vis potential defendants' activities, his notions of causal linkages often lead him to limit the set of plaintiffs who can attack those activities. Third, Justice Stevens recognizes the central role of the facts in each antitrust case, and he is extremely respectful of the job done by the trier of fact in the court of original jurisdiction. But sometimes he finds a deeper or richer understanding of these facts than did the court below—or than his colleagues do—and sometimes, for all his attention to the facts, he does not provide an interpretation that is clearly more illuminating than competing alternatives.

## II. A COMMON LAW APPROACH AND THE SEARCH FOR COHERENCE

### A. *The Common Law of Unreasonable Restraints of Trade*

Justice Stevens's approach to antitrust law is that of a common law judge. Courts have a major role to play in this area of law because, although it is statutorily based, the principal statute, the Sherman Act, is extremely vague.<sup>7</sup> The legislative statement is a skeleton that leaves a broad range for courts to fill in, a task they have indeed pursued over time. Justice Stevens takes the role of the judiciary in this area to be the careful elaboration of the vague commands of the Sherman Act, an elaboration that is to come from a case-by-case development that is highly attentive to the facts of the particular cases.<sup>8</sup>

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7. When Justice Stevens considers application of the Robinson-Patman Act, another antitrust statute that is less vague than the Sherman Act, he focuses more intently on statutory language and on the statute's express recognition of only certain limited affirmative defenses. *See Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 554-57 (1990).

8. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 603 (1976) ("[T]he Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies."). Among the sources upon which Justice Stevens has drawn for the filling-in of the gaps in the Sherman Act are common-law precedents that precede the Act itself. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 386 (1991) (Stevens, J., dissenting) (citing *The Case of Monopolies*, 77 Eng. Rep. 1260 (Q.B. 1602)); *cf. Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 736-37 (1988) (Stevens, J., dissenting) ("Congress plainly intended the Act to be interpreted in the light of its common-law background . . ."); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 785

While Justice Stevens takes this common law approach to antitrust, he strives for coherence and unity in this body of law. He repeatedly identifies the goal of the antitrust laws as the preservation of competition in the ultimate service of enhancing consumer welfare.<sup>9</sup> There are times, however, at which this singlemindedness fades to the background and indeed a possibly inconsistent goal—protecting competitors<sup>10</sup>—comes to the fore.<sup>11</sup>

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(1984) (Stevens, J., dissenting) ("Since the statute was written against the background of the common law, reference to the common law is particularly enlightening in construing the statutory requirement of a 'contract, combination in the form of trust or otherwise, or conspiracy'."); *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983) ("Congress intended the [Sherman] Act to be construed in the light of its common-law background."); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978) ("The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

9. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (considering "impact on consumers"); *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (pointing to extraction of monopoly profits "at the expense of the consuming public" as "central concern of both the development of the common law of restraint of trade and our antitrust jurisprudence"); *Hoover*, 466 U.S. at 600 (referring to imposition of "the very costs on the consuming public which the antitrust laws were designed to avoid"); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984) (defendant's actions "widen consumer choice . . . and hence can be viewed as procompetitive"); *NCAA*, 468 U.S. at 107 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)) ("Congress designed the Sherman Act as a consumer welfare prescription." (internal quotation marks omitted)); *NCAA*, 468 U.S. at 110 (noting "Sherman Act's command that price and supply be responsive to consumer preference"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984) (noting that "the statute was especially intended to serve" the interests of the consumer); *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 530 (1983) ("The legislative history of [Section 7 of the Sherman Act] shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices . . ."); *Associated Gen. Contractors*, 459 U.S. at 538 ("[T]he Sherman Act was enacted to assure customers the benefits of price competition . . ."); *National Soc'y of Professional Eng'rs*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

10. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 353 (1990) (Stevens, J., dissenting) (noting that in at least some situations, "the antitrust laws protect competitors precisely for the purpose of protecting competition"); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 125 (1986) (Stevens, J., dissenting) (noting congressional purpose, in enacting 1950 amendment to Section 7 of Clayton Act, of protecting small businesses); *Cargill*, 479 U.S. at 128-29 (inferring reasonable probability that a competitor will be harmed from reasonable probability that competition will be harmed).

11. Cf. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (stating that the

Indeed, in at least one instance, Justice Stevens explicitly rejects the proposition that economic efficiency and consumer welfare are the sole objective of the antitrust laws.<sup>12</sup> The Justice does not provide much of a reconciliation of the several goals he identifies, which the case law, following the language of *Brown Shoe*, customarily characterizes as opposing objectives.

There is the further problem, in striving for coherence, that Justice Stevens, and the entire Court for that matter, has not been clear exactly what he means by competition. At some points, what is to be preserved by antitrust law is a particular process. At others, a set of outcomes—the ones that a perfectly competitive market would produce—constitutes the target at which the antitrust laws aim.

### *B. Horizontal and Vertical Restraints*

Justice Stevens's search for coherence in the antitrust laws and his expression of the unity he finds have several different dimensions. First, he believes that the best way to understand section 1 of the Sherman Act is as an attack on the restraints of trade that Judge (later Chief Justice) Taft described as “naked restraints” of trade in his *Addyston Pipe* opinion<sup>13</sup> nearly a century ago. Although Justice Stevens generally respects and defers to the precedents that distinguish vertical restraints of trade from horizontal ones and that prescribe different treatment for the two types of agreements, he believes there is a unity to section 1 of the Sherman Act. For him, this finds expression in Judge Taft's distinction between naked restraints of trade and ancillary restraints of trade.<sup>14</sup>

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antitrust laws were enacted for “the protection of *competition*, not *competitors*”).

12. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 360 (1990) (Stevens, J., dissenting) (“The Court, in its haste to excuse illegal behavior in the name of efficiency, has cast aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare. . . .” (footnotes omitted)).

13. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

14. *Id.* at 282-83 (“[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. . . . But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void.”)

Justice Stevens's characterization of the core meaning of section 1 leads him to conceptualize some cases in a different way than do his colleagues on the Court. A principal example is the *Business Electronics* case.<sup>15</sup> Here Justice Scalia wrote for the majority that a manufacturer's termination of a price-cutting dealer as a result of complaints by a competing dealer is not a per se violation of section 1 unless the manufacturer and the complaining dealer, who survives in the market, agree on a price to be charged. Justice Stevens, emphasizing the unity of section 1, essentially collapsed the categories of horizontal and vertical restraints<sup>16</sup> and focused on the effects that the agreement between the manufacturer and the complaining dealer had on the market in which the dealers sold. Since Justice Stevens had no doubt that the agreement resulted in elimination of some competition, the only question remaining for him was whether the agreement was ancillary to some other agreement or was a naked restraint.<sup>17</sup> Since "the contractual relationship between [the manufacturer] and [the complaining dealer] was exactly the same after [the price-cutting dealer's] termination as it had been before that termination,"<sup>18</sup> the result of the agreement was a per se illegal "naked restraint" of trade in the dealer market, which constituted a violation of section 1 of the Sherman Act.

Similarly, in the *ARCO* case,<sup>19</sup> Justice Stevens was less taken than were his colleagues in the Court majority by the fact that the maximum price to be charged at the retail level was set by the oil company manufacturer rather than by the dealers themselves. He saw little difference in the effect on the retail gasoline market between such a constraint being imposed by participants in that market themselves and the same price being set by the manufacturer.<sup>20</sup> Whether imposed horizontally or vertically, a naked

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15. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

16. *Id.* at 736 (Stevens, J., dissenting) ("[T]he restraint that results when one or more dealers threaten to boycott a manufacturer unless it terminates its relationship with a price-cutting retailer is more properly viewed as a 'horizontal restraint.'").

17. *Id.* (dismissing distinction between horizontal and vertical restraints as "quite irrelevant to the outcome of this case," and arguing that distinction between naked restraints and ancillary restraints is "of much greater importance"); *id.* at 744-45.

18. *Id.* at 740-41.

19. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (Stevens, J., dissenting).

20. *Id.* at 355 ("This focus on the vertical character of the agreement is misleading because it incorrectly assumes that there is a sharp distinction between vertical and horizontal arrangements, and because it assumes that all vertical arrangements affect competition in the same way.").

restraint of trade—of the classic price-fixing type—had been effected, and it was per se illegal.

*C. The Rule of Reason and Per Se Rules*

A second manifestation of Justice Stevens's quest for unity is his conviction that in antitrust law generally, and particularly in the law concerning horizontal restraints of trade, there is only one inquiry, and that is the application of the rule of reason.<sup>21</sup> This analysis has two complementary branches, he tells us in his important opinion for the Court in *Professional Engineers*,<sup>22</sup> but they are simply two different strands of the same approach.<sup>23</sup> The per se approach applies when the nature and character of the restraint itself makes detailed analysis unnecessary, while the more detailed rule-of-reason inquiry is applied when that clarity is absent. As courts become more familiar with the effects of particular practices in the marketplace, the set of restraints to which a per se rule applies develops over time in a characteristically common-law fashion.<sup>24</sup> The picture of how the set of offenses in the per se circle in a Venn diagram grows over time is much the same as the picture that Justice Holmes presented in his lectures about the evolution of the common law and the allocation of tasks between judge and jury.<sup>25</sup> The articulation of per se rules is an act of judicial

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21. Cf. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) (“[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition . . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”); *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (“[T]he criteria [*sic*] to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason . . .”).

22. *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 691-92 (1978).

23. See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 476 (1978) (Stevens, J., concurring in part and dissenting in part) (“[P]roperly understood, rule-of-reason analysis is not distinct from ‘per se’ analysis. On the contrary, agreements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restrain trade . . .”).

24. *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 344 (1982) (“Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.”).

25. OLIVER WENDELL HOLMES, *THE COMMON LAW*, reprinted in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 109, 170-80 (Sheldon M. Novick ed., 1995) (1881) (explaining

economy, as each rule succinctly states the established law as it applies to particular behavior.

Not only are the application of the per se rule and the undertaking of a full-scale rule-of-reason analysis simply two facets of a unitary approach, but Justice Stevens also stresses that it is often difficult to tell from the questions asked and the scope of the inquiry a court undertakes which one of the two approaches is being followed. Sometimes as much analysis of the market and the behavior of its participants is required to apply the per se rule as is needed to reach an assessment under the rule of reason.<sup>26</sup> It is particularly difficult to discern from the substance of a Stevens opinion, and not just from the labels its author invokes, whether a rule-of-reason analysis has been used or a per se rule applied. His attention to the facts of each case is so meticulous and his compulsion to explain his decision is so strong that he invariably provides a full analysis of the market, the behavior of the participants, and the character of the restraint, even when he describes himself as applying a per se rule.

For example, in *Maricopa*<sup>27</sup> Justice Stevens tells us that the agreement among the doctors in the medical society to fix the maximum fees they will charge is a per se violation of section 1.<sup>28</sup> Putting aside whether or not one believes that his ultimate balancing decision was correct, it is difficult to see how the breadth of the consideration of the putative pro-competitive aspects of the agreement at issue in *Maricopa* would have been much greater under a rule-of-reason analysis. On the other hand, it is also true that in *NCAA*, where Justice Stevens uses a rule-of-reason approach, the analysis of the pro-competitive justifications for the restrictions in the television allocation rules under attack is fairly foreshortened.<sup>29</sup>

Despite Justice Stevens's repeated proclamation of the unity of antitrust treatment of horizontal restraints of trade under section 1, he believes that once a restraint has come to be characterized as a per se violation of the antitrust laws, that sharp characterization must be maintained. The per se treatment of these offenses—for example, minimum or maximum price fixing, boycotts, and tying—then becomes an integral part of his analysis of antitrust cases. This approach reflects Justice Stevens's deep deference to

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"process of specification" of negligent actions).

26. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 104 n.26 (1984) ("Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.")

27. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

28. *Id.* at 356-57.

29. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).



precedent, but it also constrains the analysis that he will undertake and the conclusions that he will allow himself to reach.

Consider, for example, *Jefferson Parish v. Hyde*,<sup>30</sup> in which Justice Stevens takes a major step forward in tying cases by making a showing of market power in the tying product an essential requirement of a plaintiff's action. But at least in part because of his perception of the strength of precedent<sup>31</sup> he makes this move within the context of tying being a per se offense. His approach calls for more sophisticated analysis of tying cases than an unqualified per se rule would permit, but he is unprepared to move all the way to the seemingly logical conclusion of a call for a rule-of-reason analysis in all tying cases. It is precisely such a step that Justice O'Connor takes in her concurrence,<sup>32</sup> for which she usually receives plaudits from antitrust scholars.<sup>33</sup>

Another instance in which Justice Stevens's analysis is constrained by his deference to the per se rule occurs in his dissent in *ARCO*.<sup>34</sup> In this case, the majority takes the position that a gasoline retailer can suffer antitrust injury, and hence acquire standing to recover damages, as the result of an oil company's promulgation of a maximum resale price for the retailer's competitors, only if the oil company sets a predatory price. While the majority remands the case for a determination of whether the price was set at a predatory level, Justice Stevens dissents. He would infer antitrust injury to the retailer directly from the per se character of the offense of vertical maximum resale price fixing. Because of the per se illegality of vertical resale price maintenance, Justice Stevens does not undertake a detailed inquiry into the implications of the arrangement and the effects it might have on the plaintiff retailer.

The *ARCO* majority makes the cogent case that unless the maximum price is set at a predatory level, it is hard to see how the retailer can be harmed as a result of his competitors' being barred from raising their prices above a particular level. Although Justice Stevens is usually careful about inquiring into the motivations for market participants' behavior<sup>35</sup> and the

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30. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

31. *Id.* at 9 ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'.").

32. *Id.* at 33 (O'Connor, J., concurring in judgment).

33. See, e.g., HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* § 10.4, at 362-66 (1994) (arguing against per se treatment of tying arrangements).

34. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

35. *Id.* at 358 ("In a conspiracy case we should always ask why the defendants have elected to act in concert rather than independently.").

effects of that behavior, he departs from his practice by not asking those questions here; these questions are precisely the ones the majority does ask. The reason, I suggest, is that the per se illegality of the behavior at issue forecloses such an inquiry for Justice Stevens.

The most dramatic illustration of the value that Justice Stevens attaches to per se rules is the opinion he wrote for the Court in *Superior Court Trial Lawyers*.<sup>36</sup> Writing for six Justices, Justice Stevens sharply criticizes the D.C. Circuit's characterization of a per se rule in antitrust law as "only a rule of administrative convenience and efficiency, not a statutory command."<sup>37</sup> Such a characterization, in Justice Stevens's view, vastly understates both the authority and importance of per se rules. Not only do judicially developed per se rules "have the same force and effect as any other statutory commands,"<sup>38</sup> but for reasons that transcend mere administrative convenience, they preclude inquiry into the actual effects of a particular instance of their violation. To Justice Stevens, the rationale of per se rules in antitrust is prophylactic and similar to the rationale for what may equally well be described as per se rules against exceeding speed limits. Although the vast majority of drivers who exceed speed limits might do so safely, he argues, we nevertheless outlaw driving at certain speeds because of the risks entailed by the conduct. Likewise, certain business conduct, such as price fixing, is prohibited by per se rules, without inquiry into actual effects or even potential effects in the case at bar, because of the "threat to the free market" posed by "every" instance of the conduct at issue.<sup>39</sup> Because he characterized the defendants' action in *Superior Court Trial Lawyers* as a boycott in support of an attempt to fix prices, Justice Stevens treated the action as a per se violation of the Federal Trade Commission Act. Hence, he found it unnecessary to inquire into whether the defendants actually had the market power necessary to achieve the ends they sought.<sup>40</sup>

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36. Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

37. *Id.* at 432 (internal quotation marks omitted), *quoting* Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 856 F.2d 226, 249 (D.C. Cir. 1988).

38. *Id.* at 433.

39. *Id.* at 434.

40. In articulating the rationale of per se rules in *Superior Court Trial Lawyers*, Justice Stevens gives salience to a feature of per se rules that is often forgotten. The effect of per se rules is to bring smaller economic actors within the sweep of the antitrust laws. If the rule of reason is applied, smaller economic actors may be permitted to engage in conduct that is prohibited to companies with market power. Hence, hostility to big business may actually incline a judge away from per se rules and toward the rule of reason. It is only the administrative convenience of per se rules that favors their existence as a weapon

The two dissenting opinions in the *Superior Court Trial Lawyers* case took positions sharply at odds with Justice Stevens's view of the matter. Justice Brennan emphasized the need to remand the case to ascertain whether the lawyers did possess the requisite market power.<sup>41</sup> Justice Blackmun's dissent provided a direct argument that because the defendant association's members were officers of the court, the defendant lacked the market power required to bring its action within the ambit of an antitrust violation.<sup>42</sup> Because Justice Stevens maintained an attempt to fix prices as an essential part of his characterization of what the lawyers association had done, he did not come to grips with recent developments in the Court's antitrust jurisprudence—namely, *Northwest Wholesale Stationers*<sup>43</sup>—that, arguably, had made possession of market power (or control of an essential facility) a prerequisite for application of the per se rule to concerted refusals to deal. In *Superior Court Trial Lawyers*, Justice Stevens's veneration of the per se rules of antitrust law reached an extreme when he analogized these rules to bans on stunt flying and speeding that cannot be overcome by the expressive content of banners or signs affixed to the relevant means of transportation.<sup>44</sup>

#### D. The Civil-Criminal Dichotomy

A third aspect of Justice Stevens's preference for unity in antitrust law is reflected in his opinion in *Gypsum*.<sup>45</sup> The *Gypsum* majority introduces a sharp distinction between criminal and civil liability under section 1 of the Sherman Act and requires independent proof of intent for conviction on the basis of price fixing.<sup>46</sup> Justice Stevens, concurring in all parts of the opinion except the introduction of the dichotomy,<sup>47</sup> acknowledges that he had long

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against big business. When the focus is shifted away from administrative convenience, as it is in Justice Stevens's *Superior Court Trial Lawyers* opinion, the impact of per se rules on less traditional antitrust defendants is made more apparent.

41. *Superior Court Trial Lawyers*, 493 U.S. at 436 (1990) (Brennan, J., concurring in part and dissenting in part).

42. *Id.* at 453 (Blackmun, J., concurring in part and dissenting in part).

43. *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

44. *Cf. Superior Court Trial Lawyers*, 493 U.S. at 437 (Brennan, J., concurring in part and dissenting in part) (dismissing inference from permissibility of prohibitions on airplane stunt flying to presumptive illegality of expressive boycotts as "non-sequitur").

45. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

46. *Id.* at 435.

47. *Id.* at 477 (Stevens, J., concurring in part and dissenting in part).

supported such a distinction in principle.<sup>48</sup> Indeed, were he writing on a clean slate, Justice Stevens would require a showing of specific intent, which is considerably more stringent than the majority's test that the defendants had knowledge of the market effects of their actions.<sup>49</sup> He nevertheless objects to the majority's precipitous departure from precedent,<sup>50</sup> and he expresses misgivings about the "mischief" that "the new civil-criminal dichotomy may work" in civil cases.<sup>51</sup> Enforcement of the antitrust laws relies on "conclusive presumptions" embodied in per se rules, and one such conclusive presumption is that those who engage in price fixing sufficiently to affect the market intended to do so.<sup>52</sup> Justice Stevens is apprehensive that the refusal to apply these conclusive presumptions in criminal cases might undermine their use in civil actions. A cost of introducing bifurcated standards, he suggests, is the risk that one standard will serve as a rationale for undesirable alterations in the other standard. Concern about this risk is doubtless one of the factors motivating Justice Stevens's quest for unity in the definition of the price-fixing offense.

### III. THE BROAD SWEEP OF ANTITRUST LAW

Justice Stevens's commitment to the central goal of antitrust law, the promotion and preservation of a competitive economy, is very strong. His opinions reflect a concern with reaching the broadest range of activity that is harmful to competition, whether it be undertaken by private individuals or firms or by entities supervised by federal or state governments. As his dissenting opinion in the *Omni* case<sup>53</sup> shows, he is very critical of decisions taken by his colleagues on the Court that would narrow the domain of application of antitrust law. Justice Stevens's tendency is to limit exemptions to the antitrust laws, particularly those rooted in the *Parker* doctrine.<sup>54</sup>

Indeed, Justice Stevens's first antitrust opinion as a member of the Court, *Cantor v. Detroit Edison*,<sup>55</sup> was one in which he wrote for the

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48. *Id.* at 474-75.

49. *Id.* at 474.

50. *Id.*

51. *Id.* at 475.

52. *Id.*

53. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 385 (1991) (Stevens, J., dissenting).

54. *See Parker v. Brown*, 317 U.S. 341 (1943) (holding that state actions intended to restrict competition are immune from Sherman Act scrutiny).

55. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

majority finding no exemption for actions taken in an unregulated market by a private firm subject to regulation by a state public utility commission. The defendant utility company had supplied free lightbulbs to its customers, a policy for which state law obligated it to obtain the approval of state regulators. To terminate the policy, moreover, would likewise require the commission's approval. Nevertheless, Justice Stevens wrote for the Court, "the option to have, or not to have, such a program is primarily [defendant's]." <sup>56</sup> Hence it was both fair and consistent with congressional intent to subject the defendant's actions in the unregulated lightbulb market to the strictures of the antitrust laws.

Similarly, but with regard to a different set of actors, Justice Stevens concurred in the *Boulder* decision. <sup>57</sup> There the Court held that home rule statutes did not confer upon municipalities a broad exemption from the antitrust laws. <sup>58</sup> Those statutes simply did not provide the requisite explicit statement of the state's intention to displace competition in a particular sphere of economic activity. <sup>59</sup>

Two of Justice Stevens's dissenting opinions serve to reinforce the conclusion that he takes a broad view of the activity to which the antitrust laws apply. First, in *Hoover v. Ronwin*, <sup>60</sup> even though he thought the plaintiff's claim was weak on the merits, <sup>61</sup> he was unprepared to extend a *Parker*-based exemption from section 1 of the Sherman Act to a committee of private citizens determining the passing mark on the state bar examination. <sup>62</sup> He made it clear that had the Arizona Supreme Court been setting the cutoff score on the test, the exemption would have applied. <sup>63</sup> But without explicit direction from that court to the state bar committee about how to make the determination, the group of lawyers deciding the passing grade was subject to a claim by a candidate who had failed the test and who argued that the committee was acting in restraint of trade. <sup>64</sup>

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56. *Id.* at 594.

57. *Community Communications Co., Inc. v. City of Boulder, Colo.*, 455 U.S. 40 (1982).

58. *Id.* at 48-57.

59. *Id.* at 51.

60. *Hoover v. Ronwin*, 466 U.S. 558 (1984).

61. *Id.* at 587-88 (Stevens, J., dissenting) (reasoning that plaintiff's case invited dismissal because of "low probability that [plaintiff would] prevail at trial," but that to justify dismissal, majority "substantially broadens the doctrine of antitrust immunity, using an elephant gun to kill a flea.").

62. *Id.* at 590-91.

63. *Id.* at 588.

64. *Id.* at 588-89.

Second, in *Southern Motor Carriers*,<sup>65</sup> the majority held that under *Parker* the activities of rate bureaus operating within particular states were immune from antitrust enforcement even though those activities were only permitted and not compelled.<sup>66</sup> Justice Stevens dissented—he would have rejected the claim of exemption, which was based on state action, because the activities were not compelled.<sup>67</sup> He would have denied the exemption even though he recognized, but dismissed as implausible, the majority's argument that compelling price fixing among the trucking firms could lead to an outcome that would depart even further from that yielded by unfettered competition.<sup>68</sup>

To be sure, Justice Stevens does not take an absolute stand against exemptions from the antitrust laws. To do so would be inconsistent with the deference he shows to the legislature.<sup>69</sup> Instead, his position is that if there are to be such exemptions, either they should be explicitly granted by Congress or—if they are grounded in the state action doctrine, as applied in antitrust law—they should be based on an explicit intention by a state legislature to displace competition in a particular area.<sup>70</sup> Furthermore, when private parties invoke a *Parker*-based exemption, the exempt behavior must be subject to adequate state supervision.<sup>71</sup>

In one case Justice Stevens's respect for judicial precedent and deference to the legislature caused him to grant an antitrust immunity about the merits of which he was dubious. Specifically, in *Square D*,<sup>72</sup> he wrote for the Court and held that under the precedent of *Keogh*,<sup>73</sup> a set of carriers could not be sued for treble damages by a private plaintiff when the claim attacked a rate that had been filed with and approved by the Interstate Commerce Commission.<sup>74</sup> Justice Stevens was moved to this conclusion based on a rather aged precedent because he observed that Congress was well aware of

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65. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

66. *Id.* at 61-62.

67. *Id.* at 66, 74-75.

68. *Id.* at 78.

69. See William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1140-45 (discussing Justice Stevens's deference to legislature).

70. *Southern Motor Carriers*, 471 U.S. at 80. Cf. *Hoover v. Ronwin*, 466 U.S. 558, 594 (1984) (Stevens, J., dissenting).

71. *Southern Motor Carriers*, 471 U.S. at 71.

72. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

73. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

74. *Square D Co.*, 476 U.S. at 417.

the *Keogh* holding and had had multiple adequate opportunities, when considering legislation about permissible joint activities of transportation carriers, to pass a statute that overruled that holding.<sup>75</sup>

Justice Stevens's concern that economic activity not escape the watchful eye of antitrust enforcement, whether by the government or by private attorneys general, is also apparent in his dissenting opinion in the *Copperweld* case.<sup>76</sup> In that case the majority held that cooperation between a parent and its wholly-owned subsidiary cannot constitute a "conspiracy" to which section 1 of the Sherman Act might apply; the relation between parent and wholly-owned subsidiary does not satisfy section 1's plurality requirement.<sup>77</sup> Justice Stevens believed that the majority misread the relevant precedent in reaching this conclusion,<sup>78</sup> but his principal concern seemed to be an instrumental one. The majority's position, he asserted, would allow some significantly anticompetitive actions to be pursued with impunity. Namely, a parent with market power sufficient to pursue successful anticompetitive actions in league with its subsidiary—for example, eliminating a competitor, as Justice Stevens believed *Copperweld* had done—but without enough power to cross the monopoly-power threshold and thereby render itself subject to a section 2 claim, might escape liability.<sup>79</sup>

Justice Stevens surely perceived as clearly as his colleagues did that whatever the Regal firm could have done as a wholly-owned subsidiary of *Copperweld*, it could have done in its previous incarnation as an unincorporated division of Lear Siegler. Moreover, it is difficult to believe that he did not recognize that an alternative approach to ensuring that such

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75. *Id.* at 419. Justice Stevens's commitment to judicial restraint is also evident in his *Professional Real Estate Investors* concurrence. There he chides the majority on the ground that "the Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1932 (1993) (Stevens, J., concurring); see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*'"); *United States v. United States Gypsum Co.*, 438 U.S. 422, 474 (1978) (Stevens, J., concurring in part and dissenting in part) (criticizing departure from precedent and insisting that "[n]o matter how wise the new rule that the Court adopts today may be, I believe it is an amendment only Congress may enact").

76. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

77. *Id.* at 771.

78. *Id.* at 783 (Stevens, J., dissenting) ("[T]he rule announced today is inconsistent with what this Court has held on at least seven previous occasions.").

79. *Id.* at 790-91.

actions did not escape liability would have been to modify the criterion for monopoly power, which is, after all, judicially constructed. The best explanation for the position he took is that he was very concerned about the frequency with which such potentially anticompetitive actions might occur and not sanguine about the possibility of moving his colleagues on the Court to modify the threshold for monopoly power, the first prong under the canonical *Grinnell* test for the monopolization offense.<sup>80</sup>

An application of the sham exception to the *Noerr-Pennington* doctrine<sup>81</sup> provides yet another instance in which Justice Stevens would have allowed the antitrust laws to sweep more broadly than his colleagues on the Court would have permitted. In *Professional Real Estate Investors*,<sup>82</sup> Columbia Pictures had brought copyright infringement claims against a group of hoteliers who had displayed Columbia films to hotel guests. The copyright defendants counter-claimed on antitrust grounds, alleging that the copyright lawsuit was part of a strategy to establish a monopoly. After the copyright claims had been dismissed, Columbia sought dismissal of the antitrust counter-claims on the basis of *Noerr*.<sup>83</sup> The majority would have denied the defendants the cloak of *Noerr-Pennington* immunity only if a reasonable litigant in their position would not have believed that it had a genuine probability of succeeding on the merits.<sup>84</sup> Concurring in the judgment, Justice Stevens objected to the majority's view that a lawsuit brought with a reasonable expectation of success in establishing liability could not be an "objectively baseless" lawsuit that might be prohibited by the Sherman Act.<sup>85</sup> In Justice Stevens's view, a lawsuit in which success on the merits could be reasonably expected might nevertheless be "objectively unreasonable," for instance, because of the expense of bringing the

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80. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

81. See *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (holding that concerted efforts to influence public officials, even if intended to eliminate competition, are not subject to antitrust scrutiny, unless petition to public officials is mere sham to cover attempt to interfere directly with a competitor's business relationships).

82. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993).

83. *Id.* at 1924.

84. *Id.* at 1928.

85. *Id.* at 1932 (Stevens, J., concurring in the judgment).



lawsuit.<sup>86</sup> In short, Justice Stevens would subject the merits of the litigant's case to a much more stringent cost-benefit test before he would allow the party to benefit from the antitrust immunity afforded by the *Noerr-Pennington* doctrine as applied in the context of litigation.<sup>87</sup>

Despite Justice Stevens's concern that the antitrust laws apply as broadly as possible across the economic landscape, he has occasionally taken a narrow view of the capacity of parties to sue under those laws. To be sure, he writes favorably about the role of private (and state) attorneys general in enforcing the antitrust laws. His opinion for the Court in *California v. American Stores Co.*,<sup>88</sup> which held that divestiture was a remedy that a private plaintiff could seek in a section 7 case, lauded the role of litigants other than the federal antitrust enforcement authorities in pursuing actions to maintain the competitive character of the marketplace.<sup>89</sup>

Nevertheless, Justice Stevens advocated relatively narrow standing doctrines in both *McCready*<sup>90</sup> and *Associated General Contractors*.<sup>91</sup> In *McCready*, the majority held that a consumer of the services of a psychologist could bring an antitrust action against an insurance company that would not reimburse the costs of those services unless the bill had been submitted by a psychiatrist.<sup>92</sup> But Justice Stevens would have denied that such a consumer had suffered an injury that gave her standing to sue under section 4 of the Clayton Act.<sup>93</sup> Assuming that the policy restricting reimbursement for psychologists' services was adopted pursuant to an agreement between psychiatrists and Blue Cross that violated the Sherman Act, the plaintiff lacked standing, in Justice Stevens's view, because she had sustained no "economic injury cognizable under the antitrust laws."<sup>94</sup>

86. *Id.*

87. See also *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (1982) (Posner, J.), quoted in *Professional Real Estate Investors*, 113 S. Ct. at 1935-36.

88. 495 U.S. 271 (1990).

89. *Id.* at 284 ("Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."); see also *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 352-53 (1990) (Stevens, J., dissenting) (defending antitrust standing for competitor harmed by vertical conspiracy); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 129 (1986) (Stevens, J., dissenting) ("Effective enforcement of the antitrust laws has always depended largely on the work of private attorney generals . . .").

90. *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982).

91. *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

92. *McCready*, 475 U.S. at 484-85.

93. *Id.* at 495 (Stevens, J., dissenting).

94. *Id.* at 493-94.

Similarly, in *Associated General Contractors*, he wrote for the Court to deny standing to a union that alleged that an association of contractors was undertaking actions that would deny business to other contractors, subcontractors, or customers who would deal with the plaintiff union.<sup>95</sup>

In both *McCready* and *Associated General Contractors*, Justice Stevens's common-law notions of causal linkages appear to have overcome his concern for the broadest scope of enforcement of the antitrust laws.<sup>96</sup> More importantly, though, he displays a readiness to restrict the class of permissible plaintiffs so long as there is an alternative plaintiff who might challenge the conduct at issue. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general."<sup>97</sup> Denying standing to an antitrust plaintiff is permissible only when, as in both *McCready* and *Associated General Contractors*, such a denial "is not likely to leave a significant antitrust violation undetected or unremedied."<sup>98</sup> Hence, Justice Stevens's relatively restrictive standing doctrine does not restrict the scope of conduct that should be subject to antitrust scrutiny.

Moreover, there are other instances involving jurisdictional issues in which Justice Stevens takes a much more expansive view of the applicability of the antitrust laws. In *Summit Health*<sup>99</sup> he wrote for the Court to weaken the contact a plaintiff must demonstrate between a putative violation of the antitrust laws and interstate commerce. As Justice Scalia argued forcefully in dissent, the *Summit Health* Court essentially lets an action go forward if the market in which the affected party participates has an impact on interstate commerce.<sup>100</sup> Prior to 1980, as Justice Scalia noted, the prerequisite for bringing an antitrust action was that the specific conduct alleged in the complaint affected interstate commerce.<sup>101</sup> With *McLain v. Real Estate Board of New Orleans*<sup>102</sup> came a weakening of the requirement to a showing that the activity "infected" by the putative violation was sufficiently

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95. *Associated Gen. Contractors*, 495 U.S. at 545-46.

96. *Id.* at 535-46 (comparing the common-law concept of proximate cause with the issue of antitrust standing).

97. *Id.* at 542.

98. *Id.*

99. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991).

100. *Id.* at 336 (Scalia, J., dissenting).

101. *Id.* at 334.

102. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980).

tied to interstate commerce. The *Summit Health* decision made the required connection to interstate commerce still weaker. Consequently, more potentially anticompetitive behavior became subject to the antitrust laws.

#### IV. DEFERENCE TO THE TRIER OF FACT

A central characteristic of Justice Stevens's approach to antitrust cases is the deference that he pays the trier of fact in the trial court.<sup>103</sup> He relies heavily on those findings and expresses dismay when, in his view, his colleagues on the Court substitute their own judgments about the facts for those of the finder of fact in the lower court, whether the case was tried to a judge or to a jury. In his dissent in *Brook Group*,<sup>104</sup> for example, where he believed that predatory behavior by a group of cigarette manufacturers was more plausible than the majority found it to be, his analysis of the behavior of market participants relied critically on the trial record and the jury's findings based on that record.<sup>105</sup> As another example, in *BMI* Justice Stevens dissented from the opinion of the Court, not because he disagreed with its conclusion that the case called for a rule-of-reason analysis, but because he believed that the record of the District Court and the findings of the judge provided an adequate basis for carrying out the requisite analysis.<sup>106</sup> There was, to his mind, no need to remand the case for further consideration by the Circuit Court of Appeals, especially since the decision he favored would have upheld, though modified, the judgment of the Court of Appeals.<sup>107</sup>

Justice Stevens's opinions express his deep confidence in the judicial system and, in particular, in the ability of juries to make appropriate findings

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103. Cf. Popkin, *supra* note 69 at 1100 (citing declarations by Justice Stevens in non-antitrust cases of deference to trier of fact).

104. *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).

105. *Id.* at 2604 (Stevens, J., dissenting) ("After 115 days of trial, during which it considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses, the jury deliberated for nine days and then returned a verdict finding that [defendant] engaged in price discrimination with a 'reasonable possibility of injuring competition.' The Court's contrary conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence.").

106. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 26 (1979) (Stevens, J., dissenting) ("The record before this Court is a full one, reflecting extensive discovery and eight weeks of trial. The District Court's findings of fact are thorough and well-supported.").

107. *Id.* at 25-26.

of fact. In several of his dissenting opinions, he explicitly criticizes what he perceives to be his colleagues' lack of confidence in the judicial process. He finds the majority in each such case fashioning a legal rule that is overly broad because the majority fears the inability of juries to make distinctions that Justice Stevens believes they are fully capable of making. For example, in *Omni*,<sup>108</sup> he argues that juries can distinguish independent municipal action from action that results from an anticompetitive agreement between municipal officials and private agents, and indeed he argues that the jury did just that when the case was tried. He criticizes the majority for broadening the immunity of municipalities simply because it doubts the ability of juries to make such distinctions.<sup>109</sup>

Similarly, in *Business Electronics*<sup>110</sup> he argues that juries can discriminate between dealer terminations that are rooted in anticompetitive agreements and those that have a legitimate competitive basis. The majority opinion had expressly relied on the difficulty a manufacturer would have "to convince a jury that its motivation" in terminating a dealer was to ensure adequate services rather than to maintain a minimum price.<sup>111</sup> In his dissent, Justice Stevens argues that the majority's insistence that for such a termination to be per se illegal it must be accompanied by an explicit agreement as to price between the surviving dealer and the manufacturer is an unnecessary prophylactic requirement to ensure that juries do not go astray.<sup>112</sup> Justice Stevens believes that juries will be able to distinguish pretextual explanations of actions that eliminate price competition from legitimate justifications, which might be grounded, for example, in attempts to stimulate provision of dealer services. In his view, the majority formulates its explicit-price-term rule because it worries, mistakenly, about future juries' capacities to discern such differences.<sup>113</sup>

As a final example, in *Hoover v. Ronwin*<sup>114</sup> Justice Stevens remarks on the irony that a group of lawyers is unwilling to place faith in the legal

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108. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

109. *Id.* at 387 (Stevens, J., dissenting) ("The holding evidences an unfortunate lack of confidence in our judicial system . . ."); *id.* at 395 ("Judges who are closer to the trial process than we are do not share the Court's fear that juries are not capable of recognizing the difference between independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party.").

110. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

111. *Id.* at 727-28.

112. *Id.* at 751-52 (Stevens, J., dissenting).

113. *Id.* at 752 ("[T]he majority exhibits little confidence in the judicial process as a means of ascertaining the truth.").

114. 466 U.S. 558 (1984).

system to determine whether or not the group acted in an anticompetitive way. He chides the majority for having cloaked the committee setting the passing grade for admission to the bar with *Parker*-based immunity because the Court was concerned that without such protection, lawyers would worry about how well antitrust claims against them would be decided and would shrink from participating on such public service committees.<sup>115</sup> At a minimum, Justice Stevens believes that although the plaintiff's claim might have lacked merit, it should have survived the motion to dismiss that the District Court judge had granted on antitrust immunity grounds. It was totally inappropriate, in his view, to stretch the reach of an immunity doctrine simply to avoid having to have the judicial system adjudicate what was most likely a frivolous claim.<sup>116</sup>

#### V. THE CENTRAL ROLE OF THE FACTS

Justice Stevens's deference to the factfinding of those closer to the trial—the jury and the trial judge—reflects not only his view of the appropriate institutional roles of the various participants in the judicial process but also the importance he attaches to the facts themselves. The facts are central to his common-law approach to the antitrust laws.<sup>117</sup> Each of Justice Stevens's opinions provides a careful statement of the facts, and he frequently begins a dissenting opinion with his own restatement of the facts of the case.<sup>118</sup> He emphasizes that it is important to understand exactly what the market participants involved in the case did,<sup>119</sup> and his dissent often relies heavily on his recasting of the facts. "Speculation about hypothetical cases," the Justice has written in another context, "illuminates the discussion

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115. *Id.* at 598 (Stevens, J., dissenting).

116. *Id.* at 601.

117. *Cf.* Popkin, *supra* note 69, at 1105-10 (discussing Justice Stevens's focus on facts in constitutional and other adjudication).

118. *See, e.g.,* Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2599-2602 (1993) (Stevens, J., dissenting); Hoover v. Ronwin, 466 U.S. 558, 586 (1984) (Stevens, J., dissenting); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 26-28 (1979) (Stevens, J., dissenting).

119. In *Fortner II*, for example, Justice Stevens emphasizes that the defendants' offer of unique credit terms does not establish market power. Instead, the Court must inquire whether the company offering the terms had particular cost advantages or whether others also could offer the unique financing if they chose to do so. *United States Steel Corp. v. Fortner Enter., Inc.*, 429 U.S. 610, 619-22 (1977).

in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom.”<sup>120</sup>

Although Justice Stevens places the facts of the case at the center of each antitrust dispute, his conceptualization and characterization of the facts is not always complex or highly textured. For example, the principal issue in *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*<sup>121</sup> was whether sales of pharmaceutical products to state and local government hospitals for resale were subject to the Robinson-Patman Act. In a 5-4 decision, a majority of the Court found that these sales were not exempt from claims of price discrimination brought under the Act.<sup>122</sup> Justice Stevens joined a dissenting opinion by Justice O'Connor, but he also wrote separately to explain his argument that the pharmacies of state and local government hospitals did not come within the terms of the Act because these governmentally owned pharmacies were simply not in competition with the privately owned pharmacies.<sup>123</sup> For him, neither sales nor purchases by governmental agencies—whether at the local, state, or federal level—constituted the competition with private persons to which the statute applied.

To support his position, Justice Stevens described the understandings about the Robinson-Patman Act's zone of application that were presented at various Congressional hearings on the statute, indeed the same hearings upon which the majority relied for its argument to the contrary.<sup>124</sup> But he did not undertake a careful analysis of the market structure or of the question whether the pharmacies that were part of governmentally owned hospitals had any significant market power, which might affect the ability of other pharmacies to sell their products and services. Justice Stevens did not examine the behavior of sellers or customers in the market nor did he explore how pharmacies competed with one another in this market. Instead, he described the market and applied general arguments about the way in which governmentally owned establishments do not compete with private firms in the same line of business.<sup>125</sup>

As another example, despite his very careful description of many of the facts in the *Maricopa* case, Justice Stevens does not proceed to analyze in

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120. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 586 (1986) (Stevens, J., dissenting).

121. 460 U.S. 150 (1983).

122. *Id.* at 171.

123. *Id.* (Stevens, J., dissenting).

124. *Id.* at 172-73.

125. *Id.* at 173 -74.

depth the data he provides about market structure and behavior.<sup>126</sup> He does not explore whether an association of the size of the Maricopa Medical Society could effectively set price given the terms of the agreement among its members. Justice Stevens does not ask why the insurance companies agreed to the conditions that the Society proposed or whether the Society had market power in any meaningful sense. When he comes to discuss the doctors' arguments in support of their maximum price-fixing agreement, does he provide an adequate examination of their case that the agreement was efficiency-enhancing and would benefit consumers?

To be sure, the lack of deep analysis of these matters can be explained and justified on the ground that in *Maricopa* Justice Stevens was applying the per se rule against maximum price fixing.<sup>127</sup> But, as noted earlier, though he characterized his decision in that case as an application of the per se rule, the scope of his analysis belies his characterization. Hence, we are justified in looking for the more complete analysis I suggest he might have undertaken. And, in any event, even when Justice Stevens states that he is undertaking a rule-of-reason analysis in *BMI*,<sup>128</sup> he does not provide a complete analysis of the relevant market. In this case he does consider the market power of BMI and ASCAP, but principally by critiquing a weak argument made by the defendants that was founded on the countervailing power of the plaintiff, CBS.<sup>129</sup> Justice Stevens, however, does not give us a very deep analysis of the efficiency-enhancing properties offered in defense of the blanket-licensing arrangement that was under attack.

Two other examples of cases in which Justice Stevens provides a thick factual description but a less than complete market analysis are *Jefferson Parish*<sup>130</sup> and *Aspen*.<sup>131</sup> In the former, he goes into great detail about the agreement between the hospital and the Roux anesthesiology group, the history of the hospital, and the area in which the hospital is located.<sup>132</sup> But when it comes to the analysis, Justice Stevens spends much more time on the issue of whether anesthesiology and surgery are one service or two<sup>133</sup> than he does on the character of competition among hospitals and

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126. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 336-42 (1982).

127. *Id.* at 354-55.

128. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

129. *Id.* at 34 (Stevens, J., dissenting).

130. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

131. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

132. *Jefferson Parish*, 466 U.S. at 5-7.

133. *Id.* at 18-24.

physicians. Admittedly, he was in this instance constrained by a rather thin trial record on the issue of market definition and market structure.<sup>134</sup> But he dismisses too quickly the kinds of market characteristics—the effect of insurance and imperfect information on consumers' insensitivity to price and their sensitivity to hospital location and the like—that the Court of Appeals believed were relevant.<sup>135</sup>

In *Aspen* Justice Stevens provides a detailed history of the development of the several ski sites and the cooperative and competitive relations among them.<sup>136</sup> Indeed, the history of their cooperation in offering a multi-mountain pass is essential to his argument about why the behavior of Aspen Skiing Company ("Ski Company") satisfied the test for monopolization. Moreover, since the market-definition issue was not before the Court, he cannot be faulted for his description of the relevant market as downhill skiing at Aspen, Colorado,<sup>137</sup> problematic as that characterization is. Instead, the shortcoming of his analysis was his not examining the rich set of facts from a multiplicity of perspectives. For example, the dispute between Ski Company and Highlands could have been viewed as a dispute between two parties over the division of rents deriving from the particularly favorable location of the mountains in Aspen. From this perspective, the dispute may have carried minimal implications for efficiency. Or, as some have argued, the original multi-mountain pass arrangement may have been one in which Highlands was successfully free-riding on the attractiveness of Ski Company's slopes and getting a disproportionate share of the rents.<sup>138</sup> Given the lack of business justification offered by Ski Company for its cessation of the multi-mountain pass with Highlands, consideration of these alternative perspectives might not have affected the outcome in the case. But a more complete analysis of the vast array of factual material would have been desirable and, at a minimum, would have strengthened the support for the decision.

In sharp contrast with Justice Stevens's limited deployment of the facts in these several cases stands the broad and deep analysis that he undertook in the *Brook Group* case.<sup>139</sup> In his dissent he argued that oligopolistic predatory pricing of the type alleged was plausible in the cigarette

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134. *Id.* at 28-30.

135. *Id.* at 27-29.

136. *Aspen Skiing Co.*, 472 U.S. at 587-95.

137. *Id.* at 595-96.

138. HOVENKAMP, *supra* note 33, § 7.5, at 265.

139. *Brook Group v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).



industry.<sup>140</sup> He relied heavily on the factual record developed at trial, respected the factfinding ability of the jury, and carefully considered alternative constructions and interpretations of the factual base.

## VI. CONCLUSION

The antitrust jurisprudence of Justice Stevens, as manifested through his opinions during his first twenty years on the Supreme Court, is the handiwork of a devotee and craftsman of antitrust law. It provides evidence of just how difficult it is to bring unity and coherence to this important body of law, especially given the constraints of the judicial role that Justice Stevens perceives.

The principal antitrust statute is vague and open-ended, even though later, elaborating legislation has been more explicit in its commands. There is a widespread consensus about the principal goal of antitrust law, but other competing objectives also find support in both the legislative history and the judicial development over time. The latter, historical judicial elaboration has produced a set of categorical boxes that may or may not be helpful but with which a judge deciding cases today must work. The institutionally defined responsibilities and roles of other decisionmakers—Congress, the states, lower court judges, and juries—must be recognized and respected. And, in every case, the individualized set of facts is crucially important. Before rendering a decision, the antitrust judge must be sure that the facts of the case are well articulated and that the multiple stories they can be used to tell are well considered.

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140. *Id.* at 2604-06 (Stevens, J., dissenting).

